January 24 / 872
Donahue
Writ of Prohibition 12

SUPREME COURT OF THE UNITED STATES.

No. 7.—ORIGINAL.

EX PARTE: IN THE MATTER OF ALEXANDER McNIEL, PETITIONER.

Petition for writ of prohibition to the judge of the district court of the United States for the eastern district of New York.

FILED DECEMBER 15, 1871.

SUPREME COURT OF THE UNITED STATES.

No. 7.—ORIGINAL.

EX PARTE: IN THE MATTER OF ALEXANDER McNIEL, PETITIONER.

PETITION FOR WRIT OF PROHIBITION TO THE JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Clerk's certificate	1	1
Exhibit A. Libel	2	1
B	5	2
C. Answer of McNiel	7	2
D. Deposition of J. Smith	10	3
E. Final decree	15	5
Petition	17	5

1 UNITED STATES OF AMERICA,
Eastern District of New York, ss:

I, Samuel T. Jones, clerk of the district court of the United States of America for the eastern district of New York, do hereby certify that the writings annexed to this certificate, are true copies of their respective originals on file, and remaining of record in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Brooklyn, in the eastern district of New York, this 18th day of November, in the year of our Lord one thousand eight hundred and seventy-one, and of the independence of the United States the ninety-sixth.

[SEAL.] SAMUEL T. JONES, *Clerk.*

2 EXHIBIT "A."

To the Honorable Cha's L. Benedict, judge of the district court of the United States for the eastern district of New York:

The libel & complaint of Alexander S. Bantar, of said district, against John Doe and Richard Roe, (fictitious names, their real names being unknown,) owners of the bark "Maggie McNiel," in a cause of contract, civil and maritime. And thereupon the libellant alleges and propounds as follows:

First. That, during the times hereinafter mentioned, the libellant was a pilot of the port of New York, duly licensed to pilot vessels by way of Hell Gate, under and by virtue of the laws of the State of New York, and during the same time the respondents were owners of the bark "Maggie McNiel."

Second. That, on or about the 27 day of February, 1870, the libellant, at a point on Long Island Sound, off Hart's Island, tendered his services, and duly offered to the master or person in command of the said bark to pilot her by way of Hell Gate to the port of New York, and, notwithstanding the libellant was the first pilot so offering his services, he was refused.

Third. That said vessel was a registered vessel and foreign to the port of New York, and drew more than ten feet of water; so there
3 became due to the libellant, by reason of the premises and under in pursuance of the statutes in such cases made and provided, the sum of twenty-three dollars over & above all payments and just deductions.

Fourth. Payment has been demanded and refused, and all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States & of this honorable court.

Wherefore the libellant prays that process, in due form of law, may issue, & that the respondent may be cited to appear and answer all and singular the matters so as aforesaid propounded, and that such process may contain a clause to the effect that, if the respondent cannot be found, then that their goods & chattels may be attached to satisfy this claim & costs, and that this honorable court would be pleased to pronounce for the said claim, & to condemn the respondents to pay the same, and for such other & further relief in the premises as may be just.

ALEXANDER S. BANTA.

Sworn to before me this 3d day of March, 1870.

JOHN E. SWEZEY,
Notary Public N. Y. City.

F. A. WILCOX,
Proctor for Libellants.

4 (Indorsed:) U. S. district court. Alexander S. Banta vs. John Doe et al. Libel. F. A. Wilcox, lib'l. proctor, 52 Wall st. N. Y.

Let process, with clause for foreign attachment, issue as prays for herein.

CHA'S L. BENEDICT.

A true copy.
Filed March 3d, 1871.

5 EXHIBIT B.

The President of the United States of America to the marshal of the eastern district of New York, greeting:

Whereas a libel has been filed in the district court of the United States of America, for the eastern district of New York, on the 3d day of March, in the year of our Lord one thousand eight hundred and seventy, by Alexander S. Banta against John Doe et al., owners of the bark "Maggie McNiel," in a certain action, civil maritime, for pilotage therein alleged to have been furnished said resp'd't by the said libellant, amounting to twenty-three dollars, and praying that a citation may issue against the said respondent, with clause of foreign attachment, pursuant to the rules and practice of this court. Now, therefore, we do hereby empower, and strictly charge and command you, the said marshal, that you cite and admonish the said respondent, if they shall be found within the jurisdiction of said district court, that he be and appear before the said district court on the 9th day of March, 1870, at the United States court-room, in the city of Brooklyn, then and there to answer the said libel, and to make their allegations in that behalf: and if the said respondent cannot be found, that you attach the bark Maggie McNiel, property of respond'ts, to the amount sued for, and if such property cannot be found, garnishee; and that you cite and admonish the said garnishee that he be and appear before the said district court at the time and place aforesaid, and there answer on oath a solemn affirmation as to the debts, credits, or effects of the said respondent in hands, and to such interrogatories touching the same as may be propounded by the libellant; and have you then and there this writ, with your return thereon.

Witness the Honorable Charles L. Benedict, judge of said court, this 3d day of March, in the year of our Lord one thousand eight hundred and seventy, and of our independence the ninety-fourth.

[L. S.] SAMUEL T. JONES, *Clerk.*

F. A. WILCOX, *Proctor.*

(Indorsed:)

576—93. Vol. , No. United States district court. Alex. S. Banta vs. Owners of the Bark "Maggie McNiel." Process in personam, with clause of foreign attachment. Per curiam. Returnable March 9, 1870. F. A. Wilcox, proctor for lib. Filed March 9th, 1870.

I hereby depute Michael F. Brennan to execute the within process. Dated March 3d, 1870.

FRANCIS L. DALLON,
U. S. Marshal.

6 The within respondents not found in my dist. after due and

diligent search. I attached the bark Maggie McNiel, the same being the property of the said respondents.

FRANCIS L. DALLON,
U. S. Marshal E. D. of N. Y.

Dated March 3d, 1870.

7 EXHIBIT "C."

To the Honorable Cha's L. Benedict, judge of the district court of the United States for the eastern district of New York:

The answer of Alexander McNiel, sued as John Doe, to the libel and complaint of Alexander S. Bantee against the said Alexander McNiel, sued as John Doe, owner of the brig Maggie McNiel, answering, alleges and propounds as follows:

First. That this respond*a*nt denies that this is an action founded upon contract, civil and maritime.

Second. This respondent admits that the brig Maggie McNiel was, at the time mentioned in the said libel, *was* sailing under a register, and upon information and belief he denies *such* and every other allegation contained in the said libel.

Third. This respondent, upon information and belief, alleges that the said brig was towed through Hell Gate by a steam-tug which had
8 on board a duly-licensed pilot, and that the libellant paid for the said service.

Fourth. This respondent further alleges that, admitting all the facts in the said libel to be true, it constitutes no cause of action enforc*i*ble in this honorable court, and not within its jurisdiction, and he prays the same benefit and advantage as if he had specially excepted to the said libel.

Wherefore the respondent prays that this honorable court would be pleased to pronounce against the libel aforesaid, and otherwise right & justice to administ*ure* the premises, and that he may be hence dismissed with his reasonable costs & charges in this behalf most wrongfully sustained.

W. R. BEEBE,
Atto'y.

Sworn to before me this 8th day of April, 1870.

A. H. HALL,
Notary Public N. Y. Co.

BEEBE, DONOHUE & COOKE,
Proctors for Respondents.

BEEBE,
Advocate.

9 (Endorsed:) U. S. district court. Alexander S. Bantee et al. vs. Alexande' McNiel, sued as John Doe. Answer. Beebe, Donohue & Cooke, proctors. 75c. A true copy. Filed April 9th, 1870.

10 EXHIBIT D.

U. S. district court, eastern district.

ALEXANDER S. BANTA
vs.
ALEXANDER MCNIEL, SUED, &C.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

James Smith, being duly examined and sworn as a witness on the part

of the respondent, says: I am master of the bark Maggie McNiel, and she is owned in New Orleans, and bound to New Orleans, and is expected to sail Saturday or Monday; she came last from Providence to New York, by the way of Long Island Sound; she came in ballast; we arrived in New York the last day of February, on a Monday. The bark came through Hell Gate by steam; she was towed through by a steam-tug, the name of which I have forgotten; office is at number 23 South st. The bark came to an anchor Sunday evening about seven o'clock off Hart's Island. While the bark was at anchor, and soon after she came to anchor, a man calling himself a Hell Gate pilot spoke me. His name was not the same as the libellant. He asked me if I wanted a pilot, and I told
11 no, I was going to take steam; he said I should have to pay it any way. On Monday morning between 7 & 8 o'clock, I think it was, another man came along and asked if I wanted a pilot, and I told him no, that I was going to take steam, and he told me that I should have to pay for one whether I took one or not. This man did not give me his name—the first one did. To the last man who said I should have to pay it, I replied that if I had to, I supposed I should, as I had money enough to do so; and after my arrival, some person came down and demanded pilotage, and I told him it would not be paid; that is all the conversation I had. These are the only persons that spoke to me about piloting me through the Gate.

Cross-examination:

My principal and managing owner is Alexander McNiel; he lives in New Orleans. One owner lives here; his name is Edward Reed. There are one or two other owners who live in New Orleans. She is under register. I can't describe the first man who spoke; it was dark and snowing; I could hear his voice. I did not notice the second one
12 who spoke me particularly enough to describe him. I don't know the name of the person who came and asked me for the pilotage, and cannot say whether he was either of the men who had spoken to me while at anchor. I came through the Gate without a Hell-Gate pilot; I had a co'st pilot on board, who had come from Providence with me; his name was Captain Linch. I only know that he was the pilot, because he said he was, and I employed and paid him as such. I don't remember the amount I paid him. I have the bill, and think it was $30 or $35. The pilot I had on board I employed in Providence, & first saw him there. He spoke to me first and asked me if I wanted a pilot to New York, and I told him yes. That was all that was said, except that I told him I would employ him, and the price was fixed at $30 or $35. He is in Providence now, and I believe lives in Providence. He gave the courses to steer, and did about as I should do at sea; he took my place. When the first man spoke to me, I can't say where the pilot was, whether below or on deck, and the same is true as to the second man. I don't recollect whether he said anything when these men spoke me. The pilot remained
13 on board all night after the vessel arrived, and went home some time the next day. My vessel is in the freighting business, and go wherever we can get the most money.

J. SMITH.

Sworn to before me this 10th day of March, 1870.

F. A. WILCOX,
Notary Public New Y. Co.

I hereby consent that the above deposition be read on the trial of the above-entitled action, subject to all legal objections.

Dated March 10, 1870.

F. A. WILCOX,
Proctor for Lib'l't.

Filed April 29th, 1870.

14 (Indorsed:) U. S. district court. Alexander McNiel ads. Alexander S. Banta. Deposition. Beebe, Donohue & Cooke, proctors for respo'ts. $1 25. A true copy.

15 EXHIBIT E.

At a stated term of the district court of the United States of America for the eastern district of New York, held at the United States court-rooms, in the city of Brooklyn, on the eleventh day of March, in the year of our Lord one thousand eight hundred and seventy-one—present the Honorable Charles L. Benedict, district judge.

ALEXANDER S. BANTA
vs.
ALEXANDER MCNEIL, SUED AS JOHN DOE AND Richard Roe, owners of the schooner Maggie McNeil.

This cause coming on to be heard on the pleadings and proofs, and, after hearing the advocates of the respective parties, and due deliberation being had in the premises—

It is now ordered, adjudged, and decreed that the libellant recover against the respondent in this action the sum of twenty-three dollars, the amount claimed by him in and by his libel, together with his costs to be taxed; and that the respondent be adjudged to pay the same.

And on like motion it is further ordered that a summary judgment, pursuant to the act of Congress of March 3d, 1847, be, and the same is hereby, entered against Alexander McNeil, principal, and J. Smith & George W. Fowler, sureties, for the sum of sixty dollars, upon their bond given upon the discharge of the property arrested herein.

And it is further ordered that the libellant have execution to enforce satisfaction of this decree.

CHARLES L. BENEDICT.

16 (Indorsed:) Vol. , No. . U. S. district court for the eastern district of New York. Alexander S. Banta vs. Alexander McNiel. Final decree. F. A. Wilcox, proctor for libellant. Filed and entered the 18th day of March, 1871.

17 Supreme Court of the United States.

IN THE MATTER OF THE APPLICATION OF ALEXander McNeil for writ of prohibition to the district court of the United States for the eastern district of New York, in the second circuit.

To the Honorable Supreme Court of the United States:

The petition of Alexander McNiel, of New Orleans, in the State of Louisianna, respectfully shows:

That he is the owner of the brig "Maggie McNeil," of New Orleans, her tackle, apparel, and furniture.

That, in the month of February, one thousand eight hundred and seventy, the said brig was owned by your petitioner, and was engaged in the coasting trade of the United States, sailing under a register;

18 that, during said month, the said brig was bound on a voyage from Providence, Rhode Island, to the city of New York, by the way of Long Island Sound and Hell Gate, and was towed through Hell Gate by a steam-tug; that while on the way to New York, and before entering Hell Gate, one Alexander S. Banta, a pilot licensed under and by virtue of the laws of the State of New York to pilot vessels through Hell Gate, hailed those on board said vessel, and offered to pilot her through Hell Gate, aforesaid, and the services of said pilot were declined, and he performed no service in, to, or for the said brig or your petitioner; that afterwards the said Banta claimed from the master of the said brig the sum of twenty-three dollars, being a sum fixed by the laws of the State of New York as a penalty for refusing to accept such offered service, and the said master declined to pay the same.

That, on the third day of March, one thousand eight hundred and seventy-one, the said Alexander S. Banta filed his libel of complaint in the district court of the United States for the eastern district of New York, in the second circuit, against John Doe, a fictitious name, owner of said brig Maggie McNiel, claiming to recover the said sum of twenty-

19 three dollars, a copy of which said libel is hereto annexed, and marked Exhibit A.

That, upon the filing of said libel, a process was duly issued thereon by and out of said court, and delivered to the marshal of the United States for said district, and who proceeded to execute the same by attaching the said brig Maggie McNiel, a copy of which process, with the return thereon endorsed, is hereto annexed, marked Exhibit B.

That the said brig being in custody of said marshal, in said action, your petitioner appeared and claimed the said vessel, and bonded her, under and in pursuance of the provisions of the act of Congress in such case made and provided, and the said brig was delivered to your petitioner.

That thereafter, and on the ninth day of April, one thousand eight hundred and seventy, your petitioner filed his answer in said action, denying the jurisdiction of the said court, and the said action was thereupon put at issue; that a copy of the said answer is hereto annexed, marked C.

20 That your petitioner caused the testimony of the master of the said brig, (one James Smith,) to be taken de bene esse, a copy of which is hereto annexed, and marked Exhibit D.

That afterwards, the said action came on for trial before Hon. C. L. Benedict, judge of the said district court, and such proceedings were had thereon that the said court rendered a decree therein in favor of the libellant for the sum of twenty-three dollars and costs, a copy of which said decree is hereto annexed, and marked Exhibit E.

That your petitioner is informed by counsel learned in the law, and verily believes, that the cause of action set forth in the said libel of complaint is not within the admiralty and maritime jurisdiction of the United States, or of said court, and that said court had no power to proceed to hear and determine the said action upon the merits.

That, under the acts of Congress, in such case made and provided, no appeal lies to the circuit court of the United States for the said

21 circuit, but that said decree is final, and that your petitioner is

without relief, except upon the order and interposition of your honorable court.

Your petitioner further states that he is informed and believes that the said court is about to allow proceedings to be taken to enforce said decree, and that the same will be enforced, unless said district court or the judge thereof is restrained by a writ of prohibition, to be issued out of and by this honorable court, from so doing.

Wherefore your petitioner prays that this honorable court would issue a writ of prohibition, to be directed to the said the district court of the United States for the eastern district of New York or the judge thereof, restraining it or him from taking any proceedings to enforce said decree, and that it or he be perpetually restrained and prohibited from so doing, and for such other and different relief in the premises as shall seem just.

And your petitioner will ever pray.

W. R. BEEBE, *Att'y.*

22 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Welcome R. Beebe, of said city, being duly sworn, says: That he was and is one of the proctors for the respondent in the action referred to in the foregoing petition, and is the attorney for the respondent therein, and has had principal charge of the action; that the respondent is absent from this district, and as deponent believes, is in New Orleans, and cannot make the necessary affidavit to said petition; that deponent has read the said petition and is familiar with the facts therein stated, learned mostly from his connection with the said action; That the contents of said petition are true to the best of the knowledge and belief of deponent.

W. R. BEEBE.

Sworn to before me this 23 day of November, 1871.
[SEAL.]

A. W. HALL,
Notary Public N. Y. Co.

23 (Indorsed:) U. S. Supreme Court. In the matter of the application of Alexander McNiel, for writ of prohibition to the district court of the United States for the eastern district of New York in the second circuit. Petition. Beebe, Donohue & Cooke, attorneys. Banta vs. McNiel, sued as Doe, owner of brig Maggie McNiel.

(Indorsed on cover:) No. 7. Ex parte. In the matter of Alexander McNiel, petitioner. Petition for writ of prohibition to the judge of the district court of the United States for the eastern district of New York. Filed 15th December, 1871.